Supreme Court
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No. (1)

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In The
Supreme Court of the United States

DECOMA LOVE-LANE,

Petitioner,

v.

DONALD MARTIN, Individually,

Respondent.

ON CONDITIONAL CROSS-PETITION FOR
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Robert M. Elliot
Counsel of Record
Fredrick W. Evans
ELLIOT PISHKO MORGAN, P.A.
426 Old Salem Road
Winston-Salem, NC 27101
(336) 724-2828

Counsel for Petitioner

THE LEX GROUP^{DC} ♦ One Massachusetts Ave., NW ♦ Suite 670 ♦ Washington, DC 20001
(202) 789-2400 ♦ Fax: (202) 789-1911 ♦ www.thelexgroupdc.com

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err in its application of this Court's precedent affirming summary judgment in favor of the Winston-Salem/Forsyth County Board of Education and Donald Martin, officially, on Love-Lane's free speech claim?

PARTIES TO THE PROCEEDING

Conditional cross-petitioner, DeComa Love-Lane, is the plaintiff and was the appellant in the proceedings below. Donald Martin, in his individual capacity, was a defendant and appellee in the proceedings below. The Winston-Salem/Forsyth County Board of Education and Donald Martin, in his official capacity, also were defendants and appellees in the proceedings below.

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DeComa Love-Lane, conditionally cross-petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 355 F.3d 766. It is also included in the appendix to the petition for writ of certiorari filed by petitioner, Donald Martin. [Pet. App. 1a] The Fourth Circuit denied petitioner's motion for rehearing *en banc* on February 18, 2004. [Pet. App. 95a] The opinion of the district court is reported at 201 F. Supp. 2d 566.

STATEMENT OF JURISDICTION

The original petition for writ of certiorari filed by petitioner, Donald Martin, was docketed on May 21, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court and is conditional upon this Court's grant of Petitioner's petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

> right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

42 U.S.C. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Background

DeComa Love-Lane is an African-American educator who has been employed with the Winston-Salem/Forsyth County Schools since 1974. Upon her employment, school system documents describe her as "one of the best black prospects . . . ever interviewed," who "is very interested in students (white and black)–it makes no difference." *JA 427.* She served as a school teacher until 1988. *JAS 1199.*[1]

In 1988, Love-Lane was promoted to the position of assistant principal. She was assigned to Atkins Middle School in Winston-Salem. There, she worked under principal Don Golding. Love-Lane excelled in her performance as an assistant principal during her first assignment at Atkins. During each of the three years of her assignment, she was evaluated as excellent or superior in almost all aspects of her performance. Starting in the second year, her principal recommended that she be promoted to principal at some school within the system. *Record, Love-Lane Dep. Exh. 41-43.*

From 1991 to 1993, Love-Lane was assigned to Moore Elementary School as assistant principal. She worked under principal Dr. Marsha Epstein. During each of the two years of her assignment, she was

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[1]Citations to the evidence of record will include references to the Joint Appendix, "JA," and to the Joint Appendix of sealed documents, "JAS," filed with the Fourth Circuit; and to other evidence, as described, in the record below.

evaluated as superior in every aspect of her performance. In each year, her principal recommended that she be promoted to principal at some school within the system. Specifically, Dr. Epstein described Love-Lane as a "particularly strong and effective school administrator" who "is ready for a principalship." *Record, Love-Lane Dep. Exh. 44-45.*

From 1993 to 1995, Love-Lane was assigned to Cook Middle School as assistant principal. There, she worked under principal Ed Armstrong. Again, Love-Lane excelled in her performance and received superior evaluations in all aspects of her performance. She was praised for her ability to "confront issues, not people;" for her openness "with communication and with dealing with critical issues;" and for her "willingness to work with difficult people." *Record, Love-Lane Dep. Exh. 46-47.*

Lewisville Elementary School

During the summer of 1995, Love-Lane received a new assignment from her superintendent, Dr. Don Martin. She was assigned to work at Lewisville Elementary School ("Lewisville") in Lewisville, North Carolina. Martin assigned Love-Lane to this position in spite of recommendations and advice which he had received from a top assistant superintendent that the assignment was "not a good choice." *JA 607-608.* Martin insisted that "an African-American presence" was needed at the school. *JAS 1288; JAS 1211-12.*

The concern expressed by the assistant superintendent, Daisy Chambers, was that Love-Lane

would have a difficult time working under principal Brenda Blanchfield. Ms. Chambers had experienced severe problems at Lewisville in the two years before the assignment. Many staff members and parents in the community had complained to the administration about Blanchfield's leadership. Many of the complaints came from African-American parents and staff members who had experienced significant difficulties with Blanchfield which had led to racial tension.[2] *JA 362-363; JAS 1164; JA 585-602.*

Love-Lane, knowing some of the history of Blanchfield's problems, expressed her fears and concerns to Martin and his assistant, Dr. Joe Johnson. Nevertheless, she assured Martin that she would do her best for the school. She asked Martin to monitor the situation at Lewisville. *JAS 1201.*

Love-Lane remained at Lewisville for the next three years. During the school year 1995-1996, Love-Lane became aware of programs and practices which she believed were detrimental to the interests of African-American children. She expressed her concerns to Blanchfield in a respectful way, but Blanchfield took no action. During the spring of 1996, Love-Lane received a superior evaluation from Blanchfield. *JA 452.*

Tension grew in Love-Lane's second year at Lewisville. Love-Lane observed incidents, policies and practices which adversely impacted African-American

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[2]The difficulties became so divisive that two assistant superintendents, Fred Adams and Daisy Chambers, were called to help resolve the problems. *JA 581; JA 1162.*

students. Love-Lane repeatedly voiced her concerns to Blanchfield and others, but received little support. As she raised such issues more and more, her relationship with Blanchfield began to deteriorate. Love-Lane's expressions of her opinions also led to tension with certain white teachers on the staff at Lewisville. *JAS 1207-1209.*

The focal point of Love-Lane's concern from the first was the "time-out room" which had been established at Lewisville during Love-Lane's first year. The "time-out room" was a small room to which teachers could send students for any reason deemed appropriate by the teachers. Students were assigned to the room for various periods, depending on the teacher and the infraction. A non-certified part-time staff member was placed in charge of the room. There is disputed testimony as to whether the children were given regular academic assignments in the room. What is *not* disputed is that the teachers' arbitrary disciplinary practices led to the referral of a vastly disproportionate number of African-American males and females to the room, many for minor infractions. *JAS 1234-1235; JAS 1170-1196.*

Toward the end of Love-Lane's second year at Lewisville, she received her annual evaluation. She received excellent ratings on most of her work. However, Blanchfield, for the first time, raised questions concerning Love-Lane's "communication" skills. During an evaluation conference, Blanchfield indicated to Love-Lane that "most" of the staff, which she estimated at "85% of the teachers," found her "intimidating," and had objections to Love-Lane's

"direct" style of communication. Pinned down, Blanchfield narrowed the number of complaining staff members to several of the teachers, but refused to provide specific information to Love-Lane concerning these complaints. *JAS 1210; JA 568.*

During the same period, Blanchfield was required to make a recommendation concerning the renewal of Love-Lane's administrative contract. She first recommended that Love-Lane receive a three-year contract as an assistant principal. Following objections from Martin, Blanchfield submitted a new recommendation for a two-year contract. Blanchfield informed Martin that she no longer wished to work with Love-Lane. *JA 513-514.*

Seeing the handwriting on the wall, Love-Lane repeatedly requested transfers to another school, starting in 1996. She was not transferred. *JAS 1211.* During the third year Love-Lane's relationship with Blanchfield deteriorated further. The decline in her relationship with Blanchfield was directly proportionate to her speaking out on issues and incidents involving racial disparities in the treatment of African-American children. A number of incidents occurred before and during her third year (1997-1998) which evidence retaliation against her for speaking out. *JAS 1211-12.*

During the early part of the third year, Martin met with Love-Lane and Blanchfield. During his meetings he observed that Blanchfield's management skills were deficient and that she had made mistakes in dealing with Love-Lane. However, he unequivocally

announced his ultimatum that Love-Lane would have to "satisfy" her principal, Blanchfield, if she were to continue on an administrative track. He also warned her that the children should not be her concern; that she should do what it took to avoid antagonizing Blanchfield. *JA 471-475; JAS 1212.*

Love-Lane made reasonable efforts to get along with Blanchfield and other teachers who had found fault in Love-Lane's communication. *JA 427.* Nevertheless, Love-Lane continued to address issues involving African-American children. As a result, a small faction of teachers complained against Love-Lane. *JAS 1212-1213.*

At the end of the year, Blanchfield transmitted a draft of her evaluation of Love-Lane to Martin. She did not present a copy to Love-Lane. The evaluation rated Love-Lane "below standard" and "unsatisfactory" in a number of areas of performance, based primarily on Love-Lane's "communication." *JA 476.* Based on the draft, Martin issued a directive recommending the demotion of Love-Lane to teacher. *JA 481.* Martin's assistant delivered the demotion decision and Love-Lane's evaluation to Love-Lane on the same date. No effort was made by Martin to speak with Love-Lane concerning the evaluation prior to making his decision. *JAS 1290.*

Love-Lane grieved the decision of Martin before a committee of the school board. *Record, Brown Dep. Exh. 95.* A split committee voted to support Martin's recommendation, and the full board approved the decision thereafter. *Record, Brown Dep. Exh. 95-96.*

Love-Lane was assigned to teach at a high school within the system where she has been working since that time. She continues to excel as a schoolteacher, but as a result of speaking out on issues and incidents involving racial disparities in the treatment of African-American children, Love-Lane has lost any opportunity to pursue her career as an administrator. *JAS 1216.*

Proceedings Below

On August 26, 1999, respondent filed suit in the United States District Court for the Middle District of North Carolina. She alleged several claims against petitioner and the Winston-Salem/Forsyth County Board of Education ("the Board"), including her primary claim that she had been denied her rights under the First Amendment through free speech. Jurisdiction is based on 42 U.S.C. § 1983. Following discovery, petitioner and the Board filed their motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. On March 26, 2002, the district court issued its opinion dismissing all of respondent's claims. *See Love-Lane v. Martin, et. al.*, 201 F. Supp. 2d 66 (MDNC 2002).

A divided panel of the Fourth Circuit reversed the district court's dismissal of respondent's free speech claim against petitioner, in his individual capacity; but affirmed summary judgment for the Winston-Salem/Forsyth County Board of Education

("the Board") on the same claim.[3] *Love-Lane v. Martin, et al.*, 355 F.3d 756 (4th Cir. 2004).[4] On February 18, 2004, the Fourth Circuit denied petitioner's motion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

This case presents a conflict between the decision of the Fourth Circuit and other circuits in the application of the standards of Rule 56 of the Federal Rules of Civil Procedure to issues of governmental liability under 42 U.S.C. § 1983. In the event the Court grants the petition of the petitioner, the Court should review the Fourth Circuit's affirmance of the district court's summary judgment of Love-Lane's free speech claim against the Winston-Salem/Forsyth County Board of Education and Donald Martin, in his official capacity.

The Fourth Circuit Erred in its Application of this Court's Precedent Affirming Summary Judgment in Favor of the Winston-Salem/Forsyth County Board of Education and Donald Martin, Officially, on Love-Lane's Free Speech Claim.

1. This Court's guidance regarding governmental liability under § 1983.

Under § 1983, employers are responsible for constitutional violations which arise from their

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[3]The Fourth Circuit affirmed summary judgment on all other claims, as well.

[4]The opinion of the Fourth Circuit will be cited by reference to petitioner's appendix.

policies, customs or practices. *City of Canton v. Harris*, 489 U.S. 378 (1989). Official policy may be established by omission, in the failure of responsible officials to make policy or enact regulations. *Rhyne v. Henderson County*, 973 F.2d 386 (5th Cir. 1992); *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981). Liability can also be founded upon a single action by an officer with final decision making authority. *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). A local governmental unit can be held liable under § 1983 for employing a tortfeasor in deliberate indifference to an obvious risk that the tortfeasor would violate plaintiff's constitutional rights. *City of Canton*, 489 U.S. 378; *Board of County Comm'rs. of Bryan County v. Brown*, 520 U.S. 397 (1997)(municipal decision makers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action – the 'deliberate indifference' – necessary to trigger municipal liability").

In *Board of County Commissioners of Bryan County*, this Court considered, in the context of a Fourth Amendment excessive force claim whether the county should be held liable based on the sheriff's decision to hire the officer who inflicted the injuries. This Court recognized that a policymaker acting with "deliberate indifference," or "conscious disregard" for violations of constitutional rights of which he should be aware would trigger governmental liability. Such evidence would support the notion that the government was the "moving force" behind the injury alleged. *See also, Pembaur v. Cincinnati*, 475 U.S. 469 (1986); and *City of Canton v. Harris*, 489 U.S. 378 (1989). *See also, Brown v.*

Bryan County, 219 F.3d 450 (5th Cir. 2000); *Jeffes v. Barnes*, 208 F.3d 49 (2nd Cir. 2000); *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989).

2. The Fourth Circuit's application of the above principles.

The Fourth Circuit affirmed the dismissal of Love-Lane's claims against defendant Martin, in his official capacity, and the Board. The Court properly articulated the guiding standards under this Court's precedent as follows:

> To hold a municipality (a local government entity) liable for a constitutional violation under § *1983*, the plaintiff must show that the execution of a policy or custom of the municipality caused the violation. *Hall, 31 F.3d at 195.* "Municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986).* To hold a municipality liable for a single decision (or violation), the decisionmaker must possess "final authority to establish municipal policy with respect to the action ordered." *Id. at 481.* In this case the Board exercised final review authority over Martin (through the three-person panel of the Board and then the full Board) in approving his decision to

> demote Love-Lane to a teaching position. Only this action by the Board, which involved the exercise of its final policymaking authority, may serve as the basis for Board liability. *Id.* Thus, the Board cannot be held liable for personnel decisions over which it did not retain final review authority; that is, it is not liable for decisions committed to Martin's discretion because there is no respondeat superior liability under § 1983. *See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).* Rather, the Board is only liable for acts that it has "officially sanctioned or ordered." *Pembaur, 475 U.S. at 480.* This means that Love-Lane must demonstrate that the Board was aware of the constitutional violation and either participated in, or otherwise condoned, it. *See Hall, 31 F.3d at 196.*

355 F.3d at 782-83. [Pet. App. pp. 27a-28a]

The Fourth Circuit concluded that the Board was not aware of Martin's retaliatory action. The court summarized its review of the evidence in this regard as follows:

> The minutes of Love-Lane's grievance hearing reveal that Love-Lane did not argue to the Board's three-person panel that either Blanchfield or Martin retaliated against her because she was

exercising *First Amendment* rights. J.A. 278-79. Likewise, Love-Lane's "grievance book," which documented her case to the Board, did not contain anything that would have alerted the Board to her *First Amendment* claim. J.A. 195-96. Each member of the Board, which upheld Martin's decision after Love-Lane appealed the decision of the three-member panel, stated that his or her decision had nothing to do with Love-Lane's speech. Love-Lane thus offers no evidence that the Board punished her for, let alone was aware of, her opposition to race discrimination at Lewisville. In addition, the Board had before it legitimate grounds for upholding Martin's decision. We conclude that Love-Lane has not produced sufficient evidence to hold the Board liable under § 1983 for a violation of her *First Amendment* rights. *Cf. Curtis v. Oklahoma City Pub. Sch. Bd. of Educ., 147 F.3d 1200, 1216 (10th Cir. 1998)* (holding that there was no school board liability where the "record indicates that Plaintiff did not himself inform the Board, either at the pretermination hearing or in writing, that he believed the recommendation was retaliatory"). Accordingly, the district court properly rejected Love-Lane's *First Amendment* claim against the Board.

355 F.3d at 783. [Pet. App. pp. 28a-29a]

3. The Evidence and reasonable inferences of Board ratification

In applying the above standards, the Fourth Circuit overlooked evidence which, viewed in the light most favorable to Love-Lane, demonstrated that Love-Lane had presented the vital issues on which she had been speaking out to the Board, and that the Board ignored these facts in approving Martin's demotion of Love-Lane.

Documents submitted to each Board member during Love-Lane's grievance process establish the board's knowledge of the issues:

(a) Love-Lane specifically noted in her grievance her allegations of racial discrimination and listed various incidents of racial inequality at Lewisville on which she had spoken out. *JAS 1019.*

(b) Love-Lane presented a letter, dated March 30, 1998, (in addition to documents of similar substance) which detailed disciplinary actions by certain teachers that were abusive and unfair about which Love-Lane had been speaking out. Within the letter Love-Lane notified Blanchfield that certain teachers are telling white children that "black children will get them in trouble." When confronted,

these teachers stated that they considered this statement a "fact and good advise [sic]." *JA 526.*

(c) A letter from Blanchfield to Love-Lane acknowledged Love-Lane's opposition to the time out room and stated that Blanchfield considered Love-Lane's "continued vocal opposition to our implementation of the Time-Out Room as blatant disrespect for me...." *JAS 1268.*

Perhaps more importantly, a prominent member of the board, Geneva Brown, testified to her knowledge of Love-Lane's opposition to discriminatory practices at Lewisville, and the general unfairness of Martin's demotion of her. *Record, Geneva Brown Dep. pp.16, 30.* Brown's testimony, excerpts of which follow, raise an inference of notice to the Board which the Fourth Circuit found lacking:

- Ms. Brown testified that she was well-aware of the racial tension at Lewisville which preceded Love-Lane's assignment. In fact, she had been asked to conduct diversity workshops at the school to try to alleviate the problems. *Record, Geneva Brown Dep.*, p. 74.

- Ms. Brown testified that when the issue concerning Love-Lane's demotion was presented to the Board, Martin informed the Board that, "[w]e have to do something about DeComa Love-Lane". *Record, Geneva Brown Dep.*, p. 65.

- Ms. Brown testified to some knowledge of Love-Lane's speech in the following:

  Q: But you knew - did you have thoughts that maybe it was because DeComa Love-Lane was speaking out and that somebody wanted to shut her up?

  A: That could - that's a possibility, yes.

  Q: And that could be a factor in the recommendation?

  A: It could be.

  Record, Geneva Brown Dep., pp. 73-74.

- Ms. Brown testified, in addition, that, in her view, the Board accepted Martin's position without discussion or question:

  Q: Did anybody say, "why do we have to do something about DeComa Love-Lane?"

  A: No, they didn't ask why.

  Q: They just rubber-stamped it.

  A: They probably already knew.

- For these reasons, Ms. Brown was not comfortable voting in favor of Martin's recommendations, and felt that overall, Ms. Love-Lane had not been given "a fair shake." *Record, Geneva Brown Dep.*, p 9.[5]

While it is true that the minutes of Love-Lane's grievance hearing before the Board's panel does not reflect that she labeled Martin's action in terms of the First Amendment; she made it clear in her grievance and materials, as well as her comments at the hearing,

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[5]Martin's presentation was further suspect because "[h]e didn't go into any details. That's what bothered me" *Geneva Brown Dep.*, p.65. In contrast, Blanchfield "was brought down here [to central office], which to me was not a demotion, even though she had a little cut in salary." *Geneva Brown Dep.*, p. 9.

that she was continuing to speak out on issues of racial discrimination in the school which had lead to her demotion. Under this Court's precedent Love-Lane provided due notice to the Board that, in her view, both Martin's action, and her conflicts with Blanchfield (her principal), derived from the same speak activity on which the Fourth Circuit found that she had proved her claim against Martin in his individual capacity.

Finally, Board members' conclusory (and by-in-large identical) declarations denying that the basis of their action was Love-Lane's speech, was disputed by the above testimony of board member Geneva Brown and by questions concerning their credibility due to their own interests in the matter. As emphasized time and again by our courts, including this Court, questions of credibility, particular those involving motive, are for the jury. "Where motive and intent play leading roles, the proof is largely in the hands of alleged conspirators and hostile witnesses ... (T)rial by affidavit is no substitute for trial by jury ... ." *Potter v. Columbia Broadcasting System, Inc.*, 364 U.S. 464, 473(1962).

4. The Fourth Circuit's review of the evidence concerning Board ratification is in conflict with Rule 56 and this Court's precedent and decisions of other circuits; and in the event this Court decides to review factual issues raised in the Petition of Martin, the Court should review the important federal issues raised in this conditional cross-petition.

The above evidence, at least inferentially, placed the Board on notice that it was approving a retaliatory demotion. The Fourth Circuit decision to the contrary conflicts with the important principles set forth by this Court in *Bryan County* and *Harris*, as well as the decisions of other circuits. *See Settlegoode v. Portland Public Schools et al*, 362 F.3d 1118 (9th Cir. 2004); *Brown v. Bryan County*, 219 F.3d 450 (5th Cir. 2000); *Jeffes v. Barnes*, 208 F.3d 49 (2nd Cir. 2000); *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989).

Accordingly, in the event that this Court grants review of issues raised in Martin's petition—essentially factual issues—the Court should permit full presentation of the issue presented herein.

CONCLUSION

There is sufficient evidence to present to the jury regarding Love-Lane's claim of Board liability for Martin's violations of Love-Lane's rights of free speech. Thus, in the event that this Court grants the petition of defendant Martin, it should also grant the conditional cross-petition to review the Fourth Circuit's decision

affirming the dismissal of the Board and Martin, in his official capacity.

Respectfully submitted,
this the 21st day of June, 2004.

Robert M. Elliot
(Counsel of Record)
Fredrick W. Evans
Elliot Pishko Morgan, P.A.
426 Old Salem Road
Winston-Salem, NC 27101
(336) 724-2828

Counsel for Petitioner